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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. [redacted] 101

FRANK DeNIRO, JR., MICHAEL DeNIRO, and LOUIS DeNIRO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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LOUIS DeNIRO,
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OPINION BY THE COURT BELOW

The United States Court of Appeals for the Sixth Circuit delivered an opinion in this matter, which opinion has not yet been published. This opinion is set forth in the appendix hereto at pages 1a-10a of this Petition.

JURISDICTION OF THIS COURT

The Petitioners herein request review of a judgment of the United States Court of Appeals for the Sixth Circuit which judgment was entered of record therein on April 15, 1968. This judgment affirmed a verdict of guilty and

a judgment entered in the United States District Court for the Northern District of Ohio, Eastern Division, on October 15, 1965.

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred in Title 28, §1254(1).

QUESTIONS PRESENTED

I.

Did not the Court of Appeals for the Sixth Circuit, in its refusal to follow *Ingram v. United States* and the holding therein set forth that guilty knowledge is the first prerequisite to criminal culpability, improperly justify the trial court's casual rejection of knowledge and specific intent as elements of the offenses charged, thereby depriving the petitioners of their right to a judgment predicated upon governing principles of law?

II.

Did not the Court of Appeals for the Sixth Circuit err in sustaining the trial court's finding of conspiracy to violate federal law in the absence of the requisites thereof and upon the assumption that a supposed endeavor by petitioners to defraud the heirs of a decedent effected a transfer of intent into the field of federal criminal law and that specific intent was thereby supplied?

STATUTES INVOLVED

UNITED STATES CODE ANNOTATED

Title 18 Crimes and Criminal Procedure:

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (18 U.S.C. §371.)

Title 26 Internal Revenue Code of 1954:

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (26 U.S.C. 1964 ed., Sec. 7201.)

Title 26 Internal Revenue Code of 1954:

Sec. 7206. Fraud and False Statements.

Any person who —

• • • •

(2) Aid or assistance.— Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document, which is fraudulent, or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

• • • • (26 U.S.C. 1964 ed., Sec. 7206.)

STATEMENT OF THE CASE

On July 17, 1961, James Vincent DeNiro, known as Vince DeNiro, the brother of the petitioners herein, was killed by the explosion of a bomb which had been attached to the ignition of his automobile. His nearest of kin were two daughters of a marriage which had terminated in divorce. The decedent had, at various times during his life, acquired sizable sums of money and considerable physical assets. He was most secretive as to his assets and held visible or record title to nothing of any consequence at the time of his death. The government, in its brief in this matter, assumed, and both lower courts accepted this assumption, that if Vince DeNiro had ever owned the various properties considered, his placing of title thereto in the names of his brothers (the three petitioners herein) was a subterfuge and was known and recognized by the petitioners as a subterfuge.

Petitioners were indicted for conspiracy to defraud the United States and to violate various substantive statutes (Title 18, §371); for willful attempt to evade Federal Estate Tax (Title 26, §7201); and for three alleged false statements under Title 18, §1001. The false statement counts were dismissed by the trial judge upon motion.

Petitioners waived jury trial and proceeded to trial in Cleveland before the Honorable Frank J. Battisti, in the United States District Court for the Northern District of Ohio, Eastern Division. The defendants elected not to offer any evidence and to rely upon their motions for judgment of acquittal. These motions were eventually overruled and the trial judge found the petitioners guilty of conspiracy and willfully attempting to evade Federal Estate Tax. Frank and Michael DeNiro were fined $1,000 each on the conspiracy charge and were placed on probation for two years on the tax evasion charge. Louis DeNiro was in effect

sentenced to 90 days in the Cuyahoga County Jail respecting the conspiracy charge and was fined $3,000 on the evasion charge. The court made and announced findings of fact and conclusions of law (Appendix, pages 11a-18a).

Appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, which affirmed the judgment in an opinion set forth in the appendix hereto (pages 1a-10a).

The petitioners, although relatively young men, were meagerly educated and considered their record ownership as evidencing actual ownership of the corporate interests represented thereby. They also considered and stated to investigators that Vince had been the record owner of no corporate interest. Their attitude in this respect was influenced strongly by the advice which the attorney who had been employed by Vince for the several enterprises involved had given them after Vince's death. The attorney had advised petitioners that regardless of the minimal amount of the purchase price of their corporate shares, such shares represented true and legal ownership of an interest in the corporation proportionate to the number thereof which they held; that Vince had been free to make available to them such shares at any value that he chose; and that their ownership of the corporate interest represented thereby was bona fide and proper in all respects.

The properties which the Government contended belonged to Vince at the time of his death and therefore represented assets in his estate were:

(1) National Cigarette Service, a cigarette distributing company, fifty-five per cent (55%) of the shares of which had been purchased by the petitioners for a nominal price long before Vince's death. The balance of the shares thereof were in the names of other individuals.

(2) Valley Land Company, a housing development in which petitioner Michael DeNiro believed that he held an

interest by reason of the fact that he had mortgaged his home in order to make available to Vince a part of the purchase money therefor, Michael being noted of record as a shareholder therein. Vince's divorced wife had likewise invested money in this company. It is interesting to note that the seller of Valley Land considered Valley Land to have been, after his sale thereof, the property of National Cigarette Service.

(3) Cicero's Restaurant, a corporation which was owned, insofar as the corporate attorney knew, by one Cochran and one Dominic Frank.

(4) Fifty Thousand Dollars ($50,000) cash, which represented the proceeds of a loan effected by National Cigarette Service and which was repaid by National Cigarette Service through contributions by the petitioners. The deceased Vince had promoted the loan and had taken possession of the proceeds.

Little is to be gained in this proceeding from a detailed statement concerning the intricacies of the acquisition of the properties involved by Vince, his motives in placing title to these assets in the petitioners (and others); or the refusal of the petitioners to accept the title theories of the investigating agent.

Both the District Court and the Court of Appeals considered and disposed of this case as though it were a civil tax case. The controlling issues were: (1) knowledge of the existence of a federal "estate tax", (2) intent to evade such tax, and (3) the existence of a conspiracy. These considerations were casually brushed aside by those courts.

In the fifteen months following Vince's death, Internal Revenue Agent John Relic interviewed petitioners on various occasions. The period in which it is required that a federal estate tax return be filed is, of course, fifteen months (T.26, §6075). *Not once during this fifteen month period did Relic ever mention federal estate tax to these uneducated petitioners.* Actually he had stated on each occasion

during the fifteen month period that his concern was confined to the *income tax status* of the petitioner Louis DeNiro and that of the deceased Vince. Even after the expiration of this period Relic was still questioning Louis DeNiro concerning *income tax* and only casually mentioned *estate tax*. Nineteen months after Vince's death Relic first mentioned estate tax to petitioners Frank and Michael DeNiro.

Relic, on no occasion ever explained to these petitioners the meaning of the term "estate tax", did not differentiate it from income tax or *inheritance* tax, and persisted in his representations that Vince owned everything and that petitioners owned nothing.

No probate proceeding was ever instituted by petitioners or anyone else concerning Vince's alleged assets. The attorney referred to above had advised petitioners that Vince had no estate.

The trial court accepted the government's figures as to the value of the estate which Vince allegedly owned at the time of his death. The Court of Appeals accepted the net valuation placed upon Vince's purported assets by the trial court (and the Internal Revenue Service) as $215,816.43 with an estate tax liability thereon of $55,444.93. This valuation completely ignores even the actual investment which the petitioners had personally invested in or paid on behalf of the several corporations. It completely ignores the fact that $50,000.00 in cash which was included in the net figure set forth above was not the property of Vince, as was evidenced by the fact that the petitioners laboriously over the years repaid the loan which had been the source of this cash.

Both the trial court and the Court of Appeals attached excessive and controlling significance to the fact that, even

> "... that in the formative stage of the scheme the brothers were ignorant of the federal estate tax, there

if conceded

> came a point at which it was brought forcefully to their attention. On November 20, 1962 Louis was placed on notice by Special Agent Relic, of the Government's interest in collecting federal estate tax, and of the criminal penalties for attempted avoidance of such tax. On March 11, 1963, the other two brothers were given adequate notice by Relic of the claims of the Government with respect to the federal estate tax, and of the consequences of evasion. In spite of the above, the brothers continued to maintain that Vince left no estate and that they owned the assets which the court found belonged to him." (Appendix, page).

The petitioners contended strongly in both the trial court and the Court of Appeals that to require blind acceptance of a revenue agent's analysis or that of any other policeman, despite legal advice to the contrary as in the instant matter, upon pain of a judicial finding of knowledge, intent and conspiracy, is to effectively dispel the requirement of proof beyond a reasonable doubt as to the elements of knowledge and intent and to substitute therefor guilt by official announcement or accusation. The petitioners have consistently contended that the attitude of the two lower courts was improperly based upon suspicion and surmise, and not upon proof of knowledge or intent or the elements of conspiracy.

Both of the courts below assumed that the petitioners had undertaken ". . . to gather together and secure permanent possession of these and all other properties which had belonged to their deceased brother to the exclusion of his rightful heirs." The petitioners contended strongly, with respect to this consideration, that even if the petitioners had conspired to commit a *state* or *non-federal* wrong, such fact, in the absence of any knowledge of a federal statute prohibiting such conduct or of a specific intent to violate federal law, cannot work a *transference* of illegality or impropriety from state to federal spheres.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this matter for the following reasons:

(a) The Court of Appeals herein utterly ignored the holding and basic rationale of *Ingram v. United States*, 360 U.S. 672 (1959).

(b) The Court of Appeals herein sanctioned a conviction based upon the strange thesis that if one perpetrates a non-federal wrong and in so doing unknowingly and unintentionally violates a federal criminal statute which requires proof of specific intent, the specific intent is somehow supplied by the fact that the non-federal wrong was perpetrated, and in this action departed so far from accepted and usual procedures as to call for an exercise of this Court's power of supervision.

(c) The Court of Appeals herein found the elements of knowledge and specific intent to have come into existence through the fact that an Internal Revenue Agent accused petitioners of a criminal violation of federal law, and held that such accusation supplied the requisite knowledge upon which to predicate a finding of specific intent, thereby dispensing with the necessity of proof beyond a reasonable doubt. It is submitted that this also evidences a departure to such extent from accepted and usual procedures as to call for an exercise of this Court's power of supervision.

ARGUMENT

QUESTION NO. I

DID NOT THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, IN ITS REFUSAL TO FOLLOW *INGRAM V. UNITED STATES* AND THE HOLDING THEREIN SET FORTH THAT GUILTY KNOWLEDGE IS THE FIRST PREREQUISITE TO CRIMINAL CULPABILITY, IMPROPERLY

JUSTIFY THE TRIAL COURT'S CASUAL REJECTION OF KNOWLEDGE AND SPECIFIC INTENT AS ELEMENTS OF THE OFFENSES CHARGED, THEREBY DEPRIVING THE PETITIONERS OF THEIR RIGHT TO A JUDGMENT PREDICATED UPON GOVERNING PRINCIPLES OF LAW?

A.—General Considerations—The element of knowledge.

The substantive statutes involved in this case are Sections 7201 and 7206(2), Title 26, United States Code. These sections state criminal offenses which embrace the element of *specific intent*. The conspiracy aspect of the case under Title 18, Section 371, United States Code, likewise involves *specific intent* for the statutes embraced in the conspiracy count and the fraud alleged therein require proof of *specific intent*.

> "Conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Spies v. United States*, 317 U.S. 492. (emphasis added)

Specific intent cannot exist, however, without knowledge. *Direct Sales Company v. United States*, 319 U.S. 703 (1943).

It is and has been the contention of the petitioners herein that they were completely ignorant of the existence of the federal estate tax; that without knowledge of such tax and of the fact that such tax was due and owing there can be no intent to evade same; and that in the absence of a specific intent to evade such tax there can be no offense in the instant matter. It is the further contention of the petitioners that the record in this matter is completely devoid of any evidence probative in the slightest degree of the vital elements of *knowledge* and *intent*.

It is submitted that the off-hand statement of the Revenue Agent concerning *estate tax* after he had inquired exclusively into income tax matters for a period of from fifteen to nineteen months could not have served to have

endowed the petitioners with culpable knowledge and a derivative specific intent.

If, as both of the lower courts herein have held, the elements of knowledge and intent can be provided through an accusation or expression of opinion by a policeman or investigative officer, *scienter* and *mens rea* are no longer viable considerations in our law.

This court, in *Ingram v. United States*, 360 U.S. 672 (1959) conclusively stated the basics of knowledge, intent and conspiracy. The petitioners in the instant matter stand in a situation analagous to that of the two employee-defendants in *Ingram* of whom the Court said at page 677:

> "As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal the operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal *under Federal law*. Certainly there is nothing in the record to show that Smith and Law knew that Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter.
>
> "'*Without the knowledge the intent cannot exist* ***.' Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." (emphasis added)

It is set forth on page 679 of *Ingram* that Smith and Law (the employees) were *knowing participants* in a criminal enterprise under *state law*:

> "Certainly the secrecy of the operation did not go to show knowledge. This is not a case where efforts at concealment would be reasonably explainable *only* in terms of motivation to evade taxation. Here the criminality of the enterprise under local law provided more than sufficient reasons for the secrecy in which it was conducted."

Thus the court held that unless there was a *specific intent* to evade tax there could be no offense under the indictment

—even though a conspiracy existed for other purposes such as in *Ingram,* a conspiracy to operate an illegal lottery and to conceal same and its operation from local law enforcement agencies.

Even earlier, in *United States v. Murdock,* 290 U.S. 389 (1933), it was set forth that it cannot be said that intent to do a state wrong presumes an intent to defraud the Government.

Thus, if it were to be admitted *arguendo* that petitioners had intended to cheat the lawful heirs of the deceased brother, neither the scheme nor acts done to effectuate same could conceivably bear upon or import federal criminality in the absence of proof beyond a reasonable doubt respecting knowledge of federal estate tax due and owing and an intent to evade the payment of same.

In *United States v. Jones,* U.S. Tax Cases 64-1, page 9350, U.S. District Court, Georgia, Atlantic Division, 3-19-64, a case wherein the defendant was charged with having willfully attempted to evade a tax, the Court stated in its instructions to the jury:

> "The word 'Wilful' as used in Section 7201 of the Internal Revenue Code of 1954, with which the defendant stands charged *means with knowledge of the obligation to pay the tax due,* and *with intent to defraud the goverinment of that tax.*
> "There must be *willful* and positive commission of an act or acts in an attempt to defeat or evade the taxes. In other words, there must have been a *specific wrongful intent, that is, actual knowledge of the existence of the obligation and a wrongful intent to defeat or evade it.*" (emphasis supplied)

B.—The element of willfullness or specific intent and its absence in this case. Can there be a valid federal conviction of an individual who willfully perpetrates a state wrong if he has neither knowledge of a federal

statute proscriptive of the same act nor intent to violate such statute?

Inasmuch as the case at bar involves the element or issue of *specific intent* its disposition must be on a basis which is consistent with the holding of this Court in *Morissette v. United States*, 342 U.S. 246 (1952) wherein the matter of federal criminal intent was discussed definitively and in detail.

In *Morissette* it was stated that in offenses wherein intent must be established as an element, no presumption of intent can arise merely by reason of the fact that the proscribed act was committed:

> "Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

This doctrine is believed particularly applicable to this case because the Government sedulously attempted to generate the element of intent in this case through a presumption of intent. The trial judge was of the belief that even though there was no knowledge of a tax due and owing, and even if there were no intent to evade or to aid and abet the preparation or presentation of a false return, if a non-related "fraud" had been perpetrated by the appellants, such fraud would provide the missing intent in regard to the offenses actually charged. The trial judge seems to have been greatly influenced by his belief that appellants were trying to "defraud" Vince's "rightful heirs" of such assets as Vince might have had (Conclusion of Law Number 1, page . ., Appendix).

In *Spies v. United States*, 317 U.S. 492, 498, 499, it was held that willfulness is a necessary element in the offense of willfully attempting to evade or defeat a tax. The Court

further represented that *if* "* * * tax-evasion plays any part in such conduct, the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." (emphasis supplied) See also *Ingram v. United States,* 360 U.S. 672.

It is important to note, however, that lacking "tax-evasion motive", concealment for other purposes cannot serve as a basis for conviction of an alleged willful attempt to evade or defeat a tax.

The requirement that specific intent be proved beyond a reasonable doubt has been forcefully stated by the courts in *United States v. Murdock,* 290 U.S. 389 (1933), *Battjes v. United States,* 172 F2d. 1 (CA 6, 1949), *Wardlaw v. United States,* 203 F2d. 884 (CA 5, 1953).

Even in civil tax cases the courts require "clear and convincing evidence". *Hawkins v. Commissioner,* 234 F2d. 359 (CA 6, 1956). In attempting to ascertain whether an understatement was the result of fraudulent intent, the courts rely on the level of intelligence of the taxpayer and his knowledge of bookkeeping methods. *Prentice Hall Tax Service,* Volume 5, page 37.242.

It is the burden of the Government to establish specific intent by the requisite degree of criminal proof. The Government did not maintain that burden in the instant case. If the burden is onerous it is because Congress intended that it be so. An objective review of the evidence reflects a fabric of unsubstantiated inferences pyramided upon and interwoven with unsubstantiated inferences. Criminal convictions should not result from this quality of evidence.

QUESTION NO. II

DID NOT THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN SUSTAINING THE TRIAL COURT'S FINDING OF CONSPIRACY TO VIOLATE

FEDERAL LAW IN THE ABSENCE OF THE REQUISITES THEREOF AND UPON THE ASSUMPTION THAT A SUPPOSED ENDEAVOR BY PETITIONERS TO DEFRAUD THE HEIRS OF A DECEDENT EFFECTED A TRANSFER OF INTENT INTO THE FIELD OF FEDERAL CRIMINAL LAW AND THAT SPECIFIC INTENT WAS THEREBY SUPPLIED?

Count II of the indictment charges both conspiracy to defraud the United States and conspiracy to violate substantive statutes. Proof of *specific intent* by evidence which convinces beyond a reasonable doubt is essential if the Government is to prevail under such charge. The Government did not offer proof of this nature.

Respecting the charge of conspiracy to defraud the United States, it is basic that the common law meaning of fraud be applied. *United States v. Turley*, 352 U.S. 407 (1957). It is further basic that common law fraud requires proof of the elements of knowledge and specific intent.

Concerning the charge of conspiracy to violate certain federal tax statutes, such tax statutes explicitly require proof of *specific intent.*

The trial judge became imbued with the consideration that if petitioners had attempted to defraud the "rightful heirs of Vince DeNiro" (Conclusion of Law Number 1, Appendix, pg. ..) such fraud effected a transference of evil motive and intent in such manner that if, by reason of the initial, non-tax oriented fraud, the Government were impeded and impaired in its ascertainment, computation, assessment and collection of the federal estate tax, an intent to defraud the Government would be imputed to petitioners. The Court of Appeals supported the trial judge in this view. It is completely opposed, however, to the holding of this Court in *Ingram v. United States*, 360 U.S. 672.

In *United States v. Belisle,* 107 F. Supp. 283 (DC Wash., 1951) and *United States v. Woll,* 157 F. Supp. 704 (DC Pa., 1957) the courts held that in order to sustain a charge of conspiracy to defraud the United States, the United States must establish by evidence beyond a reasonable doubt the existence of *specific intent.* See also *Morissette v. United States,* 342 U.S. 246 (1952).

> "An intent to defraud cannot be presumed from an *unlawful* act which does not bespeak fraud." (Emphasis supplied).
>
> • • •
>
> "The color of the act determines the complexion of the intent only in those situations where common experience has found a reliable correlation between a particular act and a corresponding intent." *Hubbard v. United States,* 79 F2d. 850, 853 (CA 9, 1935).

In the absence of proof beyond a reasonable doubt as to the element of specific intent to defraud the United States, it is difficult to perceive how the petitioners herein could be found to have conspired.

In addition to this consideration it is believed significant to observe that the record in this case is completely lacking in evidence probative of *agreement* to jointly do the thing charged. *Ingram v. United States,* 360 U.S. 672, 677. There is no proof of a common purpose. *United States v. Goss,* 329 F2d. 180 (CA 4, 1964).

Concerning the charge of conspiracy to violate the designated tax statutes, the requirements of proof of specific intent are as demanding of the Government as with respect to conspiracy to defraud the United States.

> "'Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.'" *Ingram v. United States, supra.*
>
> "Without knowledge the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. This because charges of

conspiracy are not to be made out by piling inference upon inference." *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943).

"It is fundamental that a conviction for conspiracy under 18 U.S.C. Section 371 cannot be sustained *unless there is proof of an agreement to commit an offense against the United States.*" (emphasis added) *Ingram v. United States, supra.*

It is not believed that the fundamentals of conspiracy were proved by the Government or considered by the District Court or the Court of Appeals.

CONCLUSION

It is submitted that the petitioners were shorn of their right to a trial which was governed by those legal concepts and considerations which have long been held controlling in matters such as this.

It is submitted that the Court of Appeals erred to the great prejudice and harm of these petitioners in its rejection of the vital elements of knowledge and specific intent; in its acceptance of proof by accusation; and in the formulation of a doctrine contrary to the holdings of this court by which a transference of intent, notwithstanding an utter lack of knowledge or intent respecting federal law, is effected through a perpetration of a state or other non-federal wrong.

WHEREFORE, petitioners pray that a Writ of Certiorari issue from this Court to the United States Court of Appeals for the Sixth Circuit and that they be given leave to present these matters on their merits.

Respectfully submitted,
FRANK DENIRO, JR.,
MICHAEL DENIRO, and
LOUIS DENIRO

JAMES J. CARROLL AND SAMUEL E. KARAM,
Attorneys for Petitioners.